BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRED LEE MITCHELL	)	
Claimant	)	
VS.	)	
	)	
D & D QUICKSTEP	)	
Respondent	)	Docket No. 1,008,371
	)	
AND	)	
	)	
HIGHLANDS INSURANCE COMPANY	)	
and COLUMBIA INSURANCE GROUP	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers, Highlands Insurance Company (hereinafter Highlands) appeal from the March 27, 2003 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Judge Clark found "that the Claimant injured his low back out of and in the course of his employment with the Respondent in March 2002." [1] Accordingly, preliminary benefits were awarded. Furthermore, based upon the finding of a March 2002 accident date, those benefits were ordered paid by "Highlands Insurance Company." [2] Respondent

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[1] Order at 1.

[2] Highlands Insurance Company's coverage began August 11, 1999 and ended August 11, 2002. The ALJ's Order shows Highlands Insurance Company as the insurance carrier. However, respondent's Application for Review by Board of Appeals and Appeal Brief show the insurance carrier as Northwestern National Insurance Company. Northwestern National Insurance Company is the name of the insurance group and Highlands Insurance Company is part of that group.

and Highlands dispute those findings and seek Appeals Board (Board) review of whether claimant suffered personal injury by accident arising out of and in the course of his employment, whether timely notice was given and whether claimant made timely written claim. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing Order. [3] Respondent and Highlands also dispute the finding of a March 2002 date of accident. That issue by itself is not jurisdictional, but will be addressed to the extent necessary to decide the jurisdictional issues. [4]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Claimant alleges he injured his right knee, left shoulder, neck and low back by a series of accidents beginning "Each & every working day to March, 2002, and each working day thereafter." [5] Claimant began working for respondent on January 2, 2002 and last worked for respondent on September 6, 2002. He did not leave work because of his injuries. Rather, respondent was running out of work so claimant left to go to work for another employer. Respondent alleges that it did not know of claimant's alleged injuries until January 2003 when it received a letter from claimant's attorney. Claimant's Application for Hearing was received by the Division of Workers Compensation on January 9, 2003.

Respondent points out that although the ALJ found the low back injury occurred in March 2002 and ordered ongoing medical treatment, the medical records reflect no low back complaints after August 2002, only complaints associated with claimant's left shoulder and right knee. Furthermore, although claimant indicated that he initially injured his low back lifting a 10 x 10 deck off a trailer, he was not able to specify when that accident occurred. Similarly, claimant was unable to recall any specific date that he suffered an injury to his knee or shoulder.

Claimant's position is that he gave notice when he was taken off work by Dr. Scott Meyers. He is not alleging that there is just cause for his failure to give notice within ten days so as to extend the time for giving notice. And there is no evidence that respondent otherwise received notice within ten days as required by K.S.A. 44-520.

Respondent acknowledges that claimant was taken off work on March 27, 2002 by Dr. Meyers, but the off work slip claimant presented did not indicate that claimant had injured his back or that his condition was work-related. Claimant had gone to Dr. Meyers

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[3] K.S.A. 44-534(a)(2) and K.S.A. 44-551(b)(1).

[4] Highlands Insurance Company provided coverage until August 11, 2002, when Columbia Insurance Group became respondent's insurance carrier.

[5] K-WC-E-1 Application for Hearing (filed Jan. 9, 2003).

on his own. Dr. Myers was not the respondent's physician. And claimant never asked respondent to provide him with a physician. All of the three witnesses who testified for respondent, Susan Kling, Lora Sparling and Lloyd Sparling, said that they were unaware of any work-related back injury.

Lloyd Sparling testified that he is the owner of the respondent company. Claimant never mentioned a back injury to him, but he was aware that claimant was seeing a physician and asked claimant if he had sustained any work-related injury. Claimant specifically denied having suffered an accident at work.

Lora Sparling is the wife of Lloyd Sparling. She is also an employee of respondent and works in its office. Ms. Sparling testified that she was aware claimant was having some low back problems, but was never aware that it was work-related. In fact, Ms. Sparling testified that she specifically asked claimant whether his low back problems were due to an accident at work and that claimant answered, "No." [6] Claimant never reported a work-related injury to her. She testified that whenever a work injury was reported, an accident report would be filled out and the worker would be taken to the Minor Emergency Center.

Susan Kling, the shop foreman and one of claimant's supervisors, also asked claimant whether his back complaints were due to work. According to Ms. Kling, claimant's response was that he did not know. Claimant never asked her for workers compensation forms or to go see a physician.

Claimant attributes his injuries to his work activities throughout his period of employment, including a specific accident or event in early 2002, followed by a gradual and progressive worsening from his regular work activities thereafter. But claimant never asked respondent to provide him medical treatment while he was employed by respondent. Claimant's job duties did not change over the course of his employment nor did claimant ever ask respondent for a change of duties or for lighter work. He first sought medical treatment on March 27, 2002, with Dr. Meyers. At that time, claimant presented Dr. Meyers with a history of pain for the past two or three days. [7] Dr. Meyers diagnosed a low back strain, prescribed medications and took claimant off work for a week. When claimant returned to Dr. Meyers on April 11, 2002, he reported a sudden worsening of his pain two days earlier.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that

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[6] P.H. Trans. at 46.

[7] Respondent's Ex. 2 (March 27, 2002 office note of Dr. Meyers).

right depends. [8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." [9] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both. [10]

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports claimant's contention that he injured his back at work, but fails to support claimant's contention that he told a supervisor that his injury was work-related, as required by K.S.A. 44-520. Furthermore, respondent did not have actual knowledge of a work-related accident or injury. Therefore, the Administrative Law Judge's decision to award preliminary benefits should be reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.

WHEREFORE, it is the finding, decision, and order of the Board that the Order entered by Administrative Law Judge John D. Clark on March 27, 2003 should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

Dated this _____day of July 2003.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and Highlands Insurance Co.
Scott J. Mann, Attorney for Respondent and Columbia Insurance Group
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[8] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P. 2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[9] K.S.A. 44-508(g); *see also In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 44-501(g).